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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH RONALD SCHESSLER,

Defendant and Appellant.

B209917

(Los Angeles County
Super. Ct. No. VA100500)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed as modified.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Joseph Ronald Schessler, appeals from judgment after a jury convicted him of the first degree murder of his stepmother, Rosemary Schessler.¹ (Penal Code,² § 187.) The jury also found true two special circumstance allegations—that defendant aided and abetted the murder and it was carried out for financial gain. (§ 190.2, subds. (a)(1) & (b).) The trial court: sentenced defendant to a term of life without the possibility of parole (§ 190.2); ordered defendant to pay a \$20 court security fee (§ 1465.8, subd. (a)(1)) and a \$250 restitution fine (§ 1202.4, subd. (b)); and imposed and stayed a \$250 parole revocation fine. (§ 1202.45.) The trial court gave defendant presentence credit of 483 consisting entirely of days actually served in custody.

Defendant contends he was prejudicially deprived of his due process right to a fair trial because the prosecutor engaged in misconduct by usurping the jury's role. The purported misconduct consisted of asking two witnesses to express opinions concerning defendant's admissions concerning the murder. Defendant also contends and the Attorney General concedes the parole revocation fine (§ 1202.45) should be stricken due to his life without possibility of parole sentence and he must receive two additional days of custody credits. We modify the judgment to strike the parole revocation fine and to award two additional days of custody credits. But we affirm the judgment in all other respects.

II. BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v.*

¹ There are a number of persons referred to in this appeal with the surname of Schessler. After initially identifying them, we will refer to the parties by their first names for clarity purposes and not out of any disrespect.

² All further statutory references are to the Penal Code unless otherwise indicated.

Stainer (9th Cir. 1994) 31 F.3d 907, 908-909.) On November 17, 1989, Rosemary was married to defendant's father, George Schessler. Rosemary was killed at her home in Bellflower in the early morning of November 17, 1989. Rosemary's death was the result of a gunshot wound to the back of her head. Rosemary also had two stab wounds, one to her neck and the other to her back. There was no evidence of a forced entry into the residence. The house was not ransacked and money was found near the victim.

In 2003, defendant had been married to Teresa Schlessler since 1994. Teresa testified that she had known defendant for about 25 years. The two separated in December 2006. The two had a great relationship for the first 10 years of their marriage until mid-September 2003 when George died.

About two hours after George's death, defendant and Teresa talked about Rosemary's death. Defendant and Teresa were alone in their living room. Teresa had never met Rosemary. But Teresa knew that Rosemary had been George's wife. Teresa also knew that Rosemary had been murdered. Teresa was working at her computer when defendant called her over to where he was sitting and told her he needed to tell her something. Defendant then told Teresa, "My dad and I hired a hit man to kill Rosemary." In Teresa's words, defendant just basically said it directly like that. Teresa asked him why he was saying this to her. Defendant claimed to honor a promise to George. Defendant had promised not to tell anybody about the murder for hire plot as long as George was alive. Defendant was telling her at that time because George had just passed away. Thus, defendant no longer needed to keep George's secret. Teresa asked why defendant and George had hired a hit man to kill Rosemary. Teresa testified that defendant explained the murder as follows: "[George] had found out that Rosemary was going to divorce him after Christmas and that [George] worked long and hard for everything he had and it was [George's] children's inheritance and [defendant's] biological mother and [George] had been married for 25 years and had six kids, and [defendant's] mother took nothing, and if [defendant's] mother took nothing, that bitch wasn't going to get anything either."

Teresa testified that she could not believe defendant's sudden revelation as it seemed money was not something that warranted killing another person. Teresa could not believe that she was married to someone capable of killing someone over money. The prosecutor asked, "Did you believe him that he was telling the truth, that that's what he did?" Teresa responded, "Absolutely." The prosecutor then asked, "Did [defendant] give you any reason or indication to think that this was just some sort of flippant conversation?" Teresa responded in the negative and that defendant was crying. Although defendant used narcotics, he did not appear to be under the influence of any drugs when he was talking to her.

Teresa did not tell anyone about the conversation that evening. The two remained married after the conversation. During the remainder of their marriage, they talked about the killing about once a month. They discussed the killing more often at the end of their marriage in November 2006. The killing kept coming up because Teresa could not get past what defendant had done. Teresa did not believe defendant fabricated his admission he was involved in Rosemary's murder. Teresa could not believe that she was married to someone capable of doing what he had done.

Over the years and in the numerous conversations between Teresa and defendant after the initial disclosure, she learned more information about the killing. Teresa learned that George knew the killing was happening, pulled the covers over his head, went back to sleep, awoke several hours later, and called the police. Defendant also told Teresa how the murder was arranged. Teresa testified, "He said his father had asked him if he knew somebody that could take Rosemary out and that he said that he didn't know and that he would ask around and he found a friend of his at work that said he knew people that could take care of it." Defendant found a friend at work named Donald Clarke. Mr. Clarke said he knew people that could take care of it. Mr. Clarke would act as a "middle man" in the plot. Defendant and George would pay Mr. Clarke. In turn, Mr. Clarke would bring someone from New York to kill Rosemary. The price was \$15,000 to be paid \$7,500 up front and a second installment of \$7,500 once Rosemary was killed.

They met with Mr. Clarke in the woodshed in the family's backyard. Defendant and George did not know when Rosemary would be killed or how it would happen.

Sometime before defendant's initial disclosure to Teresa, there was an unusual message left on the couple's answering machine. After the disclosure, defendant told Teresa that it was Mr. Clarke that she heard on the answering machine. Mr. Clarke wanted \$5,000 more. If the \$5,000 were not paid, "they" were going to set defendant up to make it look like he committed the murder. Defendant paid the \$5,000 to Mr. Clarke. The killing became more and more of an issue during their marriage. It caused a tremendous strain that eventually led to a divorce. The marriage was also falling apart because defendant started to see another woman, Linda Lapoint.

Ms. Lapoint testified that she had known defendant for about 30 years. The two had been friends since she was about 20 years old. They had dated before they were married to other people. Ms. Lapoint's brother is married to defendant's sister so they would see each other over the years at family functions. In November 2006, Ms. Lapoint called defendant about mechanical work on her daughter's car. Ms. Lapoint had heard of Rosemary and knew she had been murdered. But Ms. Lapoint did not know Rosemary.

After they reconnected, defendant began telling Ms. Lapoint that he was having marital problems. Defendant constantly called Ms. Lapoint about his marriage. They also were having in person conversations. Ms. Lapoint was unaware defendant was using any kind of drugs during their conversations. Defendant did not seem to be different or indicate that there was something going on as far as drugs.

In the middle of November 2006, defendant told Ms. Lapoint that he was having trouble in his marriage. According to defendant, Teresa was going to "take him" for everything he had. This was because Teresa had information that she could hold over defendant about Rosemary's death. Ms. Lapoint testified that defendant subsequently said that Teresa had enough information on him so that he would go to jail.

In December 2006, Ms. Lapoint contacted a friend at the church she attended who is a police officer. Ms. Lapoint wanted to know what to do with the information about Rosemary's unsolved murder. Between December 2006 and March 2007, she continued

to see defendant. Their visits were more frequent. Defendant told her more about what happened to Rosemary. Ms. Lapoint testified that the murder occurred as follows: “He told me that his dad thought that Rosemary was going to harm [his dad] in some way, and so that’s—and that is why he felt that they had to kill her first before she killed [his dad].” Ms. Lapoint also testified, “[Defendant] said that he knew – –he knew people who could probably help [his dad] and said that – –he told his dad that he would check around and see if there was someone who could help them arrange to kill [Rosemary].” Defendant also told her that the amount paid to the killer was \$15,000, which George paid. Ms. Lapoint described the manner in which the money was paid, “He said that he took the money in an envelope and gave it to someone, but he didn’t know if that person was actually going to be killing the person or just [a] middleman.”

In March 2007, a police lieutenant contacted Ms. Lapoint about the information she had provided about the killing of Rosemary. Detective Brian Steinwand asked Ms. Lapoint if she would be willing to record conversations with defendant. The first time Ms. Lapoint attempted to record such a conversation she could not turn on the listening device. About two weeks later, on April 3, 2007, she made a recording of a conversation with defendant at his home. The house was where Rosemary was killed. At some point, Ms. Lapoint and defendant are discussing the acrimony in defendant’s divorce. Ms. Lapoint then asked defendant if Teresa had “any proof of anything” relating to the killing of Rosemary. Defendant responded that the only thing he knew was a recorded telephone message. However, he had deleted the message when they were calling and blackmailing him. Defendant said, “[The message] was something like, we were involved in that thing too, and you contacted our buddy, and he just handed it off to us.” Defendant stated he did not know who the people were. Defendant stated: “He told me some guy was flying out from New York. Of course, you never tell the person what’s really going on anyways.”

At one point, the prosecutor asked Ms. Lapoint about the April 3, 2007 taped recorded conversation, “At any time during this conversation, do you get the impression that he’s under the influence of any drugs?” To which she replied: “No.” The prosecutor

also asked, “Did the defendant indicate to you in any way that he was joking about this?” Ms. Lapoint stated that he did not.

During the April 3, 2007 recorded conversation, Ms. Lapoint and defendant began discussing the television show “COPS” and a KTLA news broadcast concerning Rosemary’s murder. Ms. Lapoint asked how defendant could stay in the home where Rosemary had been killed. Defendant stated that it was “really creepy” and he woke up at 1:00 a.m. the night before screaming. He said: “I was screaming, ‘Mary!’ but it wasn’t my sister. And then after I woke up . . . started think about it, God I hope I wasn’t screaming Rosemary. But I mean, I was freaked out and I couldn’t go back to sleep. And my heart was racing. And I was scared. I hate being here by myself. It’s really hard when I’m by myself.”

Ms. Lapoint and defendant began discussing that Rosemary had Lupus. Ms. Lapoint then asked defendant to tell her everything about what had happened. Ms. Lapoint asked, “Why did your dad think that she was gonna take everything?” Defendant then explained what had motivated the plan to kill Rosemary. George “thought” that Rosemary and several of her family members were plotting to kill him. George described her as a “bitch” to him and said she had become verbally abusive towards George. Defendant stated that he got along with Rosemary but at some point she was ““a total bitch to me”” and kicked him out of the home.

Defendant stated that George had Parkinson’s disease which was handled with medication. Once, George and Rosemary were in Georgia. They were visiting Rosemary’s daughter. Rosemary telephoned defendant and said she could not take it anymore living with George. She said George had broken his toe and refused to seek medical care. Defendant said he thought George did all right with medication. But defendant did not know if Rosemary had provided the requisite medication to George. George later said he thought that Rosemary and her family were giving him lysergic acid diethylamide. George also said that he heard conversations between Rosemary and her family talking about him. George thought they were either going to kill him or have him committed to a mental institution.

Defendant stated: "But he said they were in the same room talking about him. Talking about, we should just take him for a ride and leave his wallet here. Stuff like that. And just let somebody find him. And, and he was like totally out of it. And so he finally figured out that they were either gonna try and like have him committed, because they were planning another trip back there, like around, just between Thanksgiving and Christmas. And, then Rosemary told her daughter. She goes, '[D]on't worry, after Thanksgiving everything will be taken care of.' So when he came back and they got him, you know, a couple of weeks after he was back to normal again, he started telling me all this stuff. And I'm like, this is all just bizarre. And he goes, . . . '[T]hey did something. They gave me something. . . .' He said '[T]hey gave me something, and they're planning this thing because they're gonna try to make me crazy and have me committed, and once I'm back there, I don't know what she's planning on doing.... I don't know what to do.' I'm like, well, 'I don't know what to say.' And he goes, 'I think she's I think she's either going to kill me or try to have me committed.' He goes 'I got to get her first.' 'Well, what are you gonna do?' He goes, well, '[D]o you know anyone who could help me with?' 'I don't know. I could ask some of my friends.' And the first guy I asked said, '[Y]eah I could help you.'"

Ms. Lapoint asked if the people involved in the plan to kill Rosemary were from the gas station. Defendant responded: "Uh-huh. And I said uh, '[How] much money...?' He goes 'I don't know, I'll have to call my friend in New York and see. I'll let you know in a couple of days. I've never told anybody this much about it before.'" At which point, Ms. Lapoint laughed. The following colloquy then occurred. "[Defendant:] You're not going to turn me in, are you? [¶] [Ms. Lapoint:] No I'm not gonna turn you in. [¶] [Defendant:] And he goes, uh, he wants \$15,000. Half up front. And half within five days. [¶] [Ms. Lapoint:] Is that, yeah, but the people at the gas station are because you guys were dealing drugs and stuff like that? [¶] [Defendant:] It's the guy I buy drugs from. [¶] [Ms. Lapoint:] Oh. [¶] [Defendant:] And so, I told my dad."

At a later point in the recorded conversation, defendant began speaking of the incident again. Defendant stated: "So anyway, oh, my God. Just thinking of re-living

that thing over and over again.” After which the following conversation took place.

“[Ms. Lapoint:] But it’s never gonna go away. [¶] [Defendant:] Just talking about the details just brings back more memories of it. [¶] [Ms. Lapoint:] Yeah. But if you don’t- you’re already having nightmares and everything. I mean, how else are we gonna go forward? . . . [¶] [Defendant:] Just felt the need to tell you. Yeah. Well, it’s been so long. And, I’m really, really sorry that I did it. Up until the point when my dad died, I couldn’t say anything to anybody about it. Teresa kind of knew. [¶] [Ms. Lapoint:] Why couldn’t you say anything? [¶] [Defendant:] Cause I promised him, I wouldn’t, till he was gone. [¶] [Ms. Lapoint:] What difference does it make if he were gone or if he’s here? [¶] [Defendant:] So he couldn’t go to jail. [¶] [Ms. Lapoint:] Oh. [¶] [Defendant:] So I’ve lived with that since 1989. [¶] [Ms. Lapoint:] So this guy says he can contact somebody. [¶] [Defendant:] Yeah. . . . Yeah, I never met the guy. My dad got half the money together. And I took it to the guy’s house. And just handed him the envelope and left. And it just turned into a nightmare after that. [¶] [Ms. Lapoint:] To what, the guy that you talked to at the station? [¶] [Defendant:] Uh-huh. [¶] [Ms. Lapoint:] So he was the – he arranged everything else? [¶] [Defendant:] Uh-huh. And I didn’t know if he was planning on doing it himself and just didn’t wanna say or, you know. For all I know- [¶] [Ms. Lapoint:] How do you know he didn’t? [¶] [Defendant:] I don’t know. I really don’t. I don’t know who did it. All I know is who got money. That’s all I know. I have no idea who did it. [¶] [Ms. Lapoint:] And you don’t know how they got in or anything? [¶] [Defendant:] Probably, she opened the door for- [¶] [Ms. Lapoint:] Why would she open the door to someone she didn’t know? [¶] [Defendant:] I don’t know. [¶] [Ms. Lapoint:] Wasn’t it really early in the morning? [¶] [Defendant:] Nobody has been real clear with that. It was, at first it was, uh, 5:00 or 6:00 in the morning. [¶] [Ms. Lapoint:] But your dad was here. He doesn’t know what time it happened? [¶] [Defendant:] Uh-huh. [¶] [Ms. Lapoint:] Why? [¶] [Defendant:] Because, uh, I guess he never looked at a clock or anything. And he was scared to death. He told me he was hiding under the covers. See, he, he didn’t – he needed a hearing aid in one ear. And so he didn’t have that in when he went to sleep.

And then he said that he was lying on his good ear so he really didn't hear a whole lot. Just can't imagine."

Ms. Lapoint and defendant then discussed a media broadcast about Rosemary's murder. Defendant stated: "Oh my God. I can't believe that I involved myself" Ms. Lapoint responded, "You probably shouldn't have." Defendant and Ms. Lapoint then discussed the issue of remorse: "[Defendant:] No. In retrospect, I was a very different person back then. I really regret it. And I'm really sorry. [¶] [Ms. Lapoint:] Yeah, but somebody's dead too. You know. I mean, she's dead. [¶] [Defendant:] I know. I can't believe that I had something to do with it."

Defendant subsequently stated that Ms. Lapoint had always been there for him. The following colloquy then occurred: "[¶] [Ms. Lapoint:] Is that why you came over my house that morning after she got killed? [¶] [Defendant:] Uh-huh. I just felt like that if I was around you, that I wouldn't feel so bad. . . . [¶] [Ms. Lapoint:] . . . [¶] [Defendant:] I was so scared. [¶] [Ms. Lapoint:] I bet. Probably 'cause your dad was scared too, and you guys didn't know what day it was gonna happen, right? [¶] [Defendant:] Uh-huh. [¶] [Ms. Lapoint:] Isn't that why you said, that they said they were coming, and then they didn't come? [¶] [Defendant:] For weeks. [¶] [Ms. Lapoint:] So who would tell you they were gonna come? The guy you paid? [¶] [Defendant:] Uh-huh. He wouldn't tell me an exact day or an exact time or exactly how or where. First it was gonna be outside of the house. It was a real shock when it happened. And you know what? It's just really weird about it, is that she had talked about if she knew somebody that she could pay to kill her. She was in so much pain sometimes that she wished she could. I think about that a lot, and probably just to try and justify it to myself."

The conversation continued with the following. "[Defendant:] I feel like a really horrible person. You can say I am. [¶] [Ms. Lapoint:] There's not much that gonna take that feeling away. I mean, it's still what - [¶] [Defendant:] I know. [¶] [Ms. Lapoint:] Yes. There's always gonna be consequences for the choices we make. [¶] [Defendant:] I know. That's why I try and do so much good. . . . [¶] [Ms. Lapoint:] So how much

did you guys end up having to pay? You paid him the whole thing, and then he blackmailed you? [¶] [Defendant:] Plus another 5,000, yeah. [¶] [Ms. Lapoint:] 20,000 bucks? [¶] [Defendant:] Uh-huh. [¶] [Ms. Lapoint:] But your dad paid it all, right? [¶] [Defendant:] Uh-huh. Eventually, yeah. [¶] [Ms. Lapoint:] Hmmm. [¶] [Defendant:] Yeah and see, he could, he could get a hold of the cash to where it wasn't like these huge withdrawals out of the bank, 'cause he had—people paid him cash rents. And we took some money out of the bank, but I don't know exactly how he did it. I mean, I would never pay for—I don't even have that kind of money.”

III. DISCUSSION

A. The Prosecutorial Misconduct Claim

Defendant asserts prosecutorial misconduct occurred because Teresa and Ms. Lapoint were questioned about his credibility. In *People v. Chatman* (2006) 38 Cal.4th 344, 377-384 our Supreme Court considered the question of whether a prosecutor could question a criminal defendant about whether other witnesses were lying. (*Id.* at pp. 377-380.) Our Supreme Court noted it was misconduct for a prosecutor to intentionally elicit inadmissible testimony. “But, merely eliciting evidence is not misconduct.” (*Id.* at pp. 379-380 quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1218.) Furthermore, our Supreme Court questioned whether the “lying” issue line of questioning was misconduct or merely an admissibility of evidence issue. (*People v. Chatman, supra*, 38 Cal.4th at pp. 379-380.) Courts have reached three different conclusions on the “lying” question issue: the question is always improper because it requires a lay opinion without foundation and usurps the jury’s credibility role; the question is never misconduct; and the question must be considered in its context. (*Id.* at pp. 381-382.) Our Supreme Court adopted the “in its context” standard and held: “[C]ourts should carefully scrutinize were they lying questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its

discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.” (*Id.* at p. 384; see *People v. Hawthorne* (2009) 46 Cal.4th 67, 97.)

We evaluate the prosecutorial misconduct claim in this context in which it occurred. It should be noted that the prosecutor’s questions did not arise in a vacuum. Rather, the issue arose in the context of defendant’s only defense at trial. During opening statement, defense counsel, Jack Fuller, pointed out the lack of physical evidence linking defendant to the murder. Mr. Fuller then stated: “What you will hear, ladies and gentlemen, is that [defendant] has a history of drug abuse. What you’ll hear is that [defendant] has a history of lying. What you’ll hear is that [defendant] has a history of grandiosity. [¶] An expert will come and tell you, ladies and gentlemen, that the lying and the grandiosity, these are just typical symptoms of a long-term methamphetamine user. [¶] Ladies and gentlemen, what you’ll hear here is not a confession, but a fairy tale.” Dr. Terrence McGee, a specialist in addiction medicine, testified on behalf of defendant. Dr. McGee testified that a methamphetamine user is generally not reliable or trustworthy. A methamphetamine user is not trustworthy because the drug causes feelings of grandiosity.

On direct examination, the prosecutor asked Teresa, “Did you believe him that he was telling the truth, that that’s what he did?” Teresa responded, “Absolutely.” Mr. Fuller objected to the question on the grounds of speculation, conclusion, and lack of foundation. The trial court overruled the objection. The prosecutor then asked, “Did [defendant] give you any reason or indication to think that this was just some sort of flippant conversation?” Teresa responded no and that defendant was crying. When the prosecutor asked Teresa if she ever started “to think [defendant] just made this stuff up or [defendant] was just talking whacky,” Mr. Fuller objected to the question as irrelevant. The trial court overruled the objection. When cross-examined, Teresa testified that defendant was a regular methamphetamine user. He used the drugs on a daily basis. Mr. Fuller asked Teresa, “And either as a result of [the daily use of methamphetamines] and

for another reason, [defendant] was not particularly honest with you, was he?” After Teresa answered in the affirmative, Mr. Fuller asked, “You would consider [defendant] a liar, wouldn’t you?”

On redirect examination, the prosecutor asked Teresa, “[Defense] counsel asked you about [defendant] using [methamphetamine] and he would lie to you?” Teresa responded in the affirmative. The prosecutor then asked: “First, how would you know when he lied to you?” Teresa responded: “Well, there were a few times that I caught him, so I knew he was lying.” She had seen him under the influence of methamphetamines a lot. On the day George died, defendant did not exhibit any of the symptoms of being under the influence of methamphetamines.

During the course of the trial, the prosecutor asked Ms. Lapoint questions about the April 3, 2007 recorded taped conversation. The prosecutor asked, “At any point during the conversation, do you get the impression that the stuff he is telling you about Rosemary is made up?” She replied, “No.” Mr. Fuller objected to the question as speculative and conclusion. The trial court ordered the question and answer stricken. The prosecutor then asked, “Did the defendant indicate to you in any way that he was joking about this?” Ms. Lapoint stated that he did not.

After the prosecutor questioned Ms. Lapoint about the specific segments of the April 3, 2007 tape recorded conversation, the prosecutor asked her, “Throughout all of these conversations, was there any time, or anytime that’s not recorded prior to April 3rd that [defendant] ever indicated to you, you know, ‘I’m just joking about this.’?” Ms. Lapoint stated that defendant had not indicated that he was joking about the murder. When cross-examined, Ms. Lapoint was asked about a statement she made to defendant during the recorded conversation in reference to a photograph of a young man in war uniform. Ms. Lapoint told defendant “[Y]ou have a good imagination.”

We conclude the prosecutorial misconduct claim based on the liar line of questioning lacks merit in the context of this case for three reasons. First, defendant never objected to the prosecutor’s questions on misconduct grounds. In order to raise the issue on appeal, the challenged action must be assigned as misconduct in the trial court

and the defendant must request the jury be admonished. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336; *People v. Chatman*, *supra*, 38 Cal.4th at p. 380; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Here, defendant objected to the line of questions on the grounds of speculation, conclusion, and relevance. The trial court sustained one objection. However, defendant never raised a misconduct issue in response to any of the questions nor requested any appropriate admonishment to the jury. Thus, the misconduct claim has been forfeited.

Second, defendant has not shown prosecutorial misconduct occurred when Teresa and Ms. Lapoint were asked about defendant's credibility. Both Teresa and Ms. Lapoint had "personal knowledge that allow[ed] [them] to provide competent testimony that may legitimately assist" the jury in resolving credibility questions. (*People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 97-98; *People v. Chatman*, *supra*, 38 Cal.4th at p. 384.). Defendant admitted to Teresa (his wife of almost 10 years) that he had arranged Rosemary's murder. This admission was made on the day that defendant's father died in September 2003. Teresa had known defendant about 25 years at the time of the admission. She also testified that she had caught him in lies in the past. She did not think that he was under the influence of any drugs when he discussed the killing. Moreover, after defendant admitted his part in the murder to her, the couple discussed the incident numerous times for several years until their marriage ended in November 2006. Teresa considered the confession to be the source of their marital discord which ultimately led to their divorce. Thus, Teresa was familiar with defendant's behavior. Teresa also testified that she knew about defendant's behavior while he was using drugs. Teresa did not believe defendant was under the influence of drugs when he told her he arranged the murder. Teresa clearly had personal knowledge that would assist the trier of fact about defendant's credibility which was one of the main issues in the trial.

Likewise, the questions posed to Ms. Lapoint were based on her personal knowledge of defendant. Ms. Lapoint was asked about his credibility in the context of conversations including the April 3, 2007 recorded conversation. Ms. Lapoint had known defendant for almost 30 years. Ms. Lapoint dated defendant before and after his

marriage to Teresa. Ms. Lapoint did not believe that he was under the influence of drugs when he admitted to his part in the murder.

Moreover, the questions rebutted the theory that defendant was under the influence of drugs, joking, lying or being grandiose when confessing to arranging Rosemary's murder. As noted, in his opening statement, Mr. Fuller explained, "An expert will come and tell you . . . that the lying and the grandiosity, these are just typical symptoms of a long-term methamphetamine use." In accord with the defense, Mr. Fuller closely questioned the prosecution's two key witnesses, Teresa and Ms. Lapoint, about defendant's credibility. Mr. Fuller asked defendant's ex-wife, Teresa, how she could tell when defendant was "lying." When she was cross-examined, defendant's girlfriend, Ms. Lapoint, was asked whether he had "quite an imagination." The prosecutor was at least entitled to question key witnesses about whether defendant was serious, joking, or lying when the murder was discussed. There was nothing amiss with the prosecutor's questions to either Teresa or Ms. Lapoint.

Third, we also agree with the Attorney General that to the extent that the questions were improper, any alleged error was harmless because it is not reasonably probable that a jury would have reached a more favorable result. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 243.) Teresa and Ms. Lapoint testified that defendant admitted to them that he arranged Rosemary's murder. Although there were discrepancies in the versions he told the women, defendant did not veer from the main details. George asked defendant to arrange the killing. Defendant in fact asked another person to kill Rosemary. The price was \$15,000 with one-half of that sum paid in advance of the killing. Defendant and George did not know when the killing was to occur. The killing occurred while George was at home. George heard Rosemary being killed and hid under the covers. And defendant was later blackmailed for an additional \$5,000. No doubt, Dr. McGee testified methamphetamine abusers would make grandiose statements. But there was no evidence that defendant was abusing drugs at the time he admitted to the witnesses that he arranged Rosemary's murder. The defense was inconsistent with all the other evidence including defendant's recorded

statements describing the murder. Under the circumstances even if the prosecution had not asked the questions, it is not reasonable probable that a more favorable result would have been reached. (*People v. Melton* (1988) 44 Cal.3d 713, 744-745; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. The Parole Revocation Fine

Defendant argues and the Attorney General concedes that the section 1202.45 parole revocation fine which was imposed and stayed was improper. Defendant was sentenced to life without the possibility of parole. A parole revocation fine may not be imposed on a defendant serving a life without possibility of parole prison term unless there is also a determinate term to be served. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) Here, because there is no period of parole, the trial court should not have imposed a section 1202.45 parole revocation fine. (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) The parole revocation fine is stricken. (*People v. Statum* (2002) 28 Cal.4th 682, 686; *People v. Scott* (1994) 9 Cal.4th 331, 352-356.)

C. Presentence Custody Credits

Defendant asserts that the trial court miscalculated his presentence custody credits by two days awarding him only 483 days when he should have received credit for actual custody. Defendant was arrested on April 10, 2007, and sentenced on August 6, 2008, which is a total of 485 days. (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Smith* (1989) 211 Cal.App.3d 523, 525-527.) The Attorney General concedes and we agree that the judgment should be modified to reflect 485 days of presentence custody credit. (*People v. Florez* (2005) 132 Cal.App.4th 314, 319, fn. 12; *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-

428.) The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment which reflects the modifications in the judgment we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* ((2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment is modified to strike the Penal Code section 1202.45 parole revocation fine and to correct the presentence custody credits to reflect 485 days of credit. Upon remittitur issuance, the superior court clerk shall forward to the Department of Corrections and Rehabilitation an amended abstract of judgment which reflects the aforementioned modifications. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur.

The defendant objected on the basis of “speculation,” “conclusion,” “foundation,” and relevance to the questions about whether, in essence, the witnesses believed defendant. Our Supreme Court has stated that it is “questionable” as to whether the issue concerning questions about lying “is properly considered one of misconduct.” (*People v. Chatman* (2006) 38 Cal.4th 344, 379.) The court suggested that such questions can be analyzed by determining if they are admissible. The court added, “But whether we label the issue misconduct or the erroneous admission of evidence does not greatly matter, for defendant’s argument is essentially identical under either characterization.” (*Id.* at p. 380.) Thus, I do not believe the failure to object on the basis of prosecutorial misconduct constituted a forfeiture of the issue.

Generally speaking a witness may not give an opinion on whether a witness is telling the truth or whether a defendant is guilty. (*People v. Coffman and Marlow* (2004) 34 Cal 4th 1, 82; *People v. Melton* (1988) 44 Cal.3d 713, 744; see also *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.) Thus, it is at least questionable whether the witnesses’s testimony about whether they believed defendant was admissible. Nevertheless, because there was sufficient evidence that defendant was telling them the truth, any erroneous admission of the evidence was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Melton, supra*, 44 Cal.3d at p. 745.)

MOSK, J.